

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN ITS CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 2047 OF 2006

ASHOK RATANCHAND JAIN ..PETITIONER

V/S

THE STATE OF MAHARASHTRA ..RESPONDENTS

MR. ASHOK M. SARAOGI WITH MR. NIVAS KAMBLE FOR
THE PETITIONER.

CORAM : S.K. SHAH, J.

DATE : 18TH DECEMBER, 2006.

P.C.

1. By consent of the parties this matter is taken up for final disposal.

2. By this petition what is challenged is the order passed by the Magistrate dated 31.1.2006. The applicant/accused was arrested by Azad Maidan Police Station in their C.R. No. 2541 of 2004 for offence under sections 3 and 5 of the Arms Act and section 120-B read with 34 of IPC and on application being made by the Investigating Officer the accused was discharged under section 169 of Cr.P.C. Subsequently, on police collecting the

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material from Nagaland where the accused has obtained the licence, learnt that the licence obtained by the accused was fake licence. As such by their application dated 31.1.2006 made to the learned Magistrate they sought cancellation of the order earlier passed under section 169 of Cr.P.C. discharging the accused and they also sought permission to further investigate the matter and arrest of the accused. On this application, learned Magistrate passed the following order :-

" Heard learned APP.

R.O. Application is allowed as prayed for".

As a result of this order, the application made by the police was allowed and granted permission to the police to investigate the matter and to arrest the accused.

3. After this order was passed, sometime in August, 2006 the accused had moved the Sessions Court for getting Anticipatory Bail but the Sessions Court rejected that application. Therefore, the applicant/accused approached this

court by Criminal Application No. 2928 of 2006 and

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by order dated 7-8-2006 this court passed the following order :-

" It is therefore, directed that pending further investigation in Crime No.LAC/2541/2004, the applicant shall not be arrested unless order cancelling his bail is obtained by the police in accordance with law.

. The Advocate for the applicant states that he will take instructions if order dated 31.1.2006 is required to be separately challenged. There is always liberty to challenge the said order before the appropriate court."

4. It is, thereafter, the present writ petition is filed challenging the order dated 31-1-2006 which was passed by the Magistrate.

5. The learned counsel for the petitioner vehemently submits that under section 169 of Cr. P. C. the Magistrate cannot direct arrest of the accused once the accused has already been released

on bail. He also further submits that the Magistrate has no power to cancel his own order

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passed under section 169 of Cr. P. C. Learned counsel for the petitioner however concede that the Magistrate can direct/allow the police to carry out further investigation.

6. What had actually happened is that when the accused came to be released under section 169 of Cr. P. C. the accused was already on bail which was passed on 10-8-2005. While passing the discharge order under section 169 of Cr. P. C., the Magistrate did not pass any order as to the bail bond of the accused and, therefore, the bail bond furnished by the accused on 20-12-2004 is continued.

7. At any rate, by order dated 7-8-2006 the accused was granted Anticipatory Bail by this court and it was clarified by this court that the applicant/accused shall not be arrested unless order cancelling his bail is obtained by the police in accordance with law. This indicates that the Magistrate should not have passed the order for

arrest of the petitioner but the police should have made an application for cancellation of the bail earlier granted to the accused on 20-12-2004.

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Therefore, the order passed by the learned Magistrate allowing the application of the police to arrest the accused was illegal and needs to be set aside.

8. The application made by the police for cancellation of the order passed under section 169 of Cr. P. C. was also erroneous and illegal as once the accused is released under section 169 of Cr. P. C. the police should have sought permission from the Magistrate to re-open the investigation. Once the order having been passed under section 169 of Cr. P. C. there was no question of cancellation of the said order. If the permission for further investigation was granted by the Magistrate and if during investigation it was revealed that he has been guilty of the offence, the police could have sought cancellation of bail and after the Magistrate passed order for cancellation of bail, the accused could have been arrested. Under the circumstances, the order

passed by the learned Magistrate cancelling the order passed under section 169 of Cr. P. C. needs to be set aside.

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9. Under the circumstances, as discussed above, the petition is partly allowed. The order passed by the learned Magistrate cancelling his own order under section 169 of Cr. P. C. discharging the accused passed on 10-8-2005 is hereby set aside. Further, the order passed by the Magistrate allowing the police to arrest the petitioner is also set aside. The Police are at liberty to move the Magistrate for cancellation of the bail of the petitioner.

10. The order passed by the learned Magistrate permitting the police to investigate the offence is maintained.

11. The writ petition stands disposed of accordingly.

(S.K. SHAH, J.)